

IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 19.3.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

S.A.No.781 of 2013
and
M.P.No.1 of 2013

1.Renuga
2.Dhanesh

... Appellants/3rd Parties

vs.

1.K.G.Chandran ...Ist Respondent/Plaintiff
2.R.Thulasimani ...2nd Respondents/Defendant

Second Appeal filed under Section 100 of CPC preferred against the judgement and decree dated 8.10.2012 passed by the Principal District and Sessions Court, Erode, in A.S.No.16 of 2012, confirming the judgement and decree dated 31.01.2012 passed by the Second Additional Sub Court, Erode, made in E.A.51/10 in E.P.No.208/08 in O.S.No.68 of 2003.

For Appellants :: Mr.N.Manokaran

For Respondents :: Ms.P.T.Asha for
M/s.Sarvabhauman Associates
for R1

JUDGEMENT

The first respondent herein K.G.Chandran had earlier filed a suit in O.S.No.68 of 2003, on the file of the I Additional Subordinate Court, Erode, against the second respondent herein for specific performance of an agreement of sale. The suit was decreed in favour of the first respondent herein. Thereafter, the second respondent filed an appeal, in A.S.No.76 of 2007, before the I Additional District Judge, Erode. The same was dismissed on 26.6.2008, thereby confirming the judgment and decree of the trial Court. As against the same, the second respondent filed the second appeal in S.A.No.183 of 2009 before this Court and the same was also dismissed on 6.7.2010. Thus, the decree for specific performance granted in favour of the first respondent was confirmed.

2. Thereafter, the first respondent filed E.P.No.208 of 2008 before the I Additional Subordinate Judge, Erode, to execute the

decree in O.S.No.68 of 2003. On transfer, it was dealt with by the II Additional Subordinate Judge, Erode. During the pendency of the same, the appellants herein filed E.A.No.51 of 2010, under Order 21 Rule 99 C.P.C, claiming that they had a share in the suit properties and therefore, the decree in O.S.No.68 of 2003 cannot be executed against the second respondent herein. The learned II Additional Subordinate Judge, Erode, by decree and judgment dated 31.1.2012 dismissed the E.A.No.51 of 2010. As against the same, the appellants filed an appeal in A.S.No.16 of 2012 before the learned Principal District and Sessions Judge, Erode. The same was dismissed by decree and judgment dated 8.10.2012. As against the same, the appellants have come up with the present second appeal.

3. I have heard the learned counsel for the appellants and the learned counsel appearing for the first respondent. The second respondent has remained ex-parte through out. I have also perused the records carefully.

4. The case of the appellants is as follows:

(a) The appellants are the children of the second respondent, who, according to the appellants, formed a Hindu joint family. According to them, in a family partition, which took place between the second respondent and his brother, some properties were allotted to the second respondent by means of a partition deed dated 17.7.1981, under Ex.P9. Thus, according to the appellants, the joint family had a nucleus. The said properties, which were acquired by the second respondent in a family partition, were subsequently sold away and from out of the said sale consideration, according to the appellants, the suit property herein was purchased in the name of the second respondent. Thus, according to the appellants, the suit property is not the self-acquired property of the second respondent, but it is the joint family property, belonging to the second respondent and the appellants.

(b) It is the further case that the appellants filed a suit in O.S.No.905 of 2002, on the file of the Principal Subordinate Judge, Erode, against the second respondent herein for partition and for separate possession of their share. The said suit, which was filed on 17.12.2002, was decreed on 24.1.2003 as prayed for. As a matter of fact, it was an ex-parte preliminary decree passed in favour of the appellants, since the sole defendant in the suit, namely, the second respondent herein, remained ex-parte.

(c) Thereafter, according to the appellants, they filed a petition for passing a final decree and accordingly final decree was passed on 31.03.2005, under Ex.P2, thereby dividing the property by means and bounds in terms of the preliminary decree.

(d) Thereafter, to take possession, the appellants filed an execution petition and in execution of the said decree, the possession of the property was delivered to the appellants, on 13.4.2009. Thus according to the appellants, the second respondent is not the absolute owner of the suit property, as it is claimed by the first respondent and therefore, the decree in O.S.No.68 of 2003 is not executable, as the same does not bind the appellants.

5. The second respondent appeared and filed a counter in the execution petition, but in E.A.No.51 of 2010, he remained ex-parte.

6. The first respondent herein contested E.A.No.51 of 2010. His contention before the Execution Court was that the suit property was not the ancestral property of the second respondent and the plaintiffs and as a matter of fact, it was only a self-acquired property of the second respondent. Therefore, according to him, the decree in O.S.No.68 of 2003 is executable as against the second respondent. It was also contended that after entering into the sale agreement on 21.06.2002, only with a view to defeat the right and interest of the first respondent, the second respondent and the plaintiffs, in collusion, have filed the suit in O.S.No.905 of 2002 without the knowledge of the first respondent. Thus, according to the first respondent, the decree in O.S.No.905/2002 and all the subsequent proceedings were all collusive and the same do not bind the first respondent. Thus, according to him, the claim of the appellants in E.A.No.51 of 2002 was liable to be dismissed.

7. Before the Execution Court, on the side of the appellants herein, two witnesses were examined and 14 documents were exhibited and on the side of the first respondent, he was examined as R.W.1 and as many as 8 documents were exhibited.

8. Having considered all the above, the trial Court dismissed E.A.No.51 of 2010, which was confirmed by the lower appellate Court. That is how the appellants are before this Court with this second appeal.

9. In this second appeal, the following substantial questions of law have arisen for consideration:

(i) Whether the existence of joint family nucleus would by itself give rise to a presumption that the suit property is not the self-acquired property of the second respondent?

(ii) In law, is it not necessary that the appellants should have proved that out of the joint family nucleus there was surplus income, out of which, the suit property would have been purchased towards the joint family nucleus?

(iii) Is it the burden of the first respondent to prove that the suit property was purchased by the second respondent as his self-acquired property and not towards the joint family nucleus?

(iv) Whether the Courts below were right in holding that the suit property is the self-acquired property of the second respondent and therefore, the decree in O.S.No.68 of 2003 is executable?

10. The learned counsel on either side advanced arguments in extenso, taking me through the records and also placing reliance on few judgements of this Court.

11. It is the contention of the learned counsel for the appellants that under Ex.P9, it has been satisfactorily proved by the appellants that there was joint family nucleus. Ex.P9 is a partition deed entered into between the second respondent and his brother in the year 1981. This document is not under dispute. From this document, one can hold that the appellants have discharged their burden to prove that there was a joint family nucleus. To this extent, I hold that the appellants have succeeded.

12. But, the immediate next question is whether the mere proof of existence of joint family nucleus itself would suffice for the appellants to succeed.

13. My answer is an emphatic no. It is too well settled that the burden is upon the claimants to prove that the joint family nucleus had income, which was surplus and from out of the said surplus income, it could be presumed that the suit property would have been purchased. For this proposition, the learned counsel for the first respondent has relied on the judgement of this Court in Muniappa Naicker vs. Balakrishna Naicker (1998-2-L.W.259).

14. The facts in that case were almost similar. While dealing with the burden of proof, this Court relied on the judgment of the Honourable Supreme Court in Rukhmabai vs. Laxminarayan - AIR 1960 SC 335, wherein the Honourable Supreme Court has held as follows:

"... there is no presumption that any property whether moveable or immovable, held by a member of a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up claim

that hit is his personal property to establish that the said property has been acquired without any assistance from the joint family property."

15. Nextly, this Court has relied on yet another judgment of the Supreme Court in Achuthan Nair vs. Chinnammu Amma and others (AIR 1966 SC 411), wherein, the Honourable Supreme Court has held as follows:

"Under Hindu Law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint family property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus.

16. The next judgment relied on by this Court is Mudigowda vs. Ramachandra - AIR 1969 SC 1076, wherein also the Honourable Supreme Court has held as follows:

"There is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it as coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired."

17. In Baikuntha Nath Pramanik vs. Sashi Bhusan Pramanik - (1972) II S.C.W.R.406, a similar view has been expressed by the Honourable Supreme Court in the following words:

"when a joint family is found to be in possession of nucleus sufficient to make the impugned acquisitions, then a presumption arises that the acquisition standing in the name of the persons who were in the management of the family properties are family acquisitions."

18. Lastly, the judgement in M/s.Ratanchand Darbarilal v.

Commissioner of Income-tax, Madhya Pradesh- AIR 1985 SC 1572 has been relied on, wherein also the Supreme Court has expressed the same view.

19. From these judgements, it can be culled out that the Supreme Court has been taking a consistent view that for raising a presumption that a property standing in the name of a member of the Hindu joint family could have been purchased out of the joint family nucleus, two essential conditions are to be satisfied. In other words, it is the burden of the one, who asserts that it is the joint family property, to prove that first of all there was a joint family nucleus and secondly the joint family nucleus has surplus income, from out of which, one can reasonably presume that the property in question could have been purchased.

20. In the instant case, the learned counsel appearing for the appellants, however, would rely on the judgement of this Court in Malla Naicker @ Singari 2.Ramakkal 3.Nataraj vs. Jeeva (minor) 2.Senthilkumar (minor) 3.Tamilselvi- (2012 (1) CTC 128).

21. A close reading of the said judgement would also go to show that after having referred to Mulla Hindu Law and after referring to the various judgements of the Honourable Supreme Court, the learned Judge in paragraph No.22 has held as follows:

"22.The other judgments relied upon by the learned counsel for the appellants is not applicable to the fact of the case on hand. Therefore, having regard to the fact that the joint family possessed of ancestral properties and the appellants failed to prove through satisfactory evidence that they were running a separate business from which they have derived income and the fact that the first appellant is the Kartha of the joint family and the properties were purchased in his name and in the name of his wife, the legal presumption is that the ancestral properties must have provided the nucleus and the burden is on the Kartha to prove that the properties were not purchased from out of the income derived from the joint family and it was purchased from his own income."

22. Referring to the above observations of the learned Judge, the learned counsel makes an attempt to persuade me to say that in the instant case, since, by proving Ex.P9, it has been proved that there was a joint family nucleus, the burden is upon the first respondent to prove that the suit property was purchased out of the independent income of the second respondent.

23. This argument of the learned counsel for the appellants deserves only to be rejected for the simple reason that a close reading of the entire judgment of this Court in Malla Naicker case

shows that the learned Judge has simply followed the judgment of the Honourable Supreme Court, more particularly, some of the judgments which I have extracted herein above, wherein, the Honourable Supreme Court has taken the consistent view that two essential requirements, which are to be proved by a person, who asserts that the property is a joint family property or that there was a joint family nucleus and that there was surplus income, out of which, one could reasonably presume that the property could have been purchased by him.

24. In the instant case, applying the above settled legal principles, if we look into the facts, as I already pointed out, of course, the appellants have proved that there was a joint family nucleus in the year 1981, under Ex.P1, but it is nowhere the case of the plaintiffs that the suit property was purchased out of the surplus income from the properties which were acquired by the second respondent under Ex.P9. Therefore, in my considered opinion, the question of presumption that the suit property would have been purchased out of the joint family income cannot be raised at all. What had been contended in the claim application is that the properties acquired, by the second respondent, under Ex.P9, were subsequently sold and the sale consideration was utilized for the purpose of purchasing the suit property. This is essentially a question of fact. Two Courts below have held that there is no document to show that the properties acquired under Ex.P9 were sold subsequently. Assuming that they were sold, it is not known as to for what amount they were sold. It is also not in evidence that the said sale consideration was in any manner utilized for the purpose of purchasing the suit property in the name of the second respondent. In the absence of evidence to prove these vital facts, in my considered opinion, the Courts below were right in holding that the suit property was not an ancestral property.

25. As I already pointed out, had it been the case of the appellants that there existed a joint family nucleus and that the joint family has surplus income and from out of the said surplus income of the joint family nucleus the suit property was purchased, then the burden would shift upon the first respondent herein to prove that the suit property was not purchased out of the joint family income. All these considerations are not before me because of the specific stand taken by the appellants before the lower Court that the suit property was not purchased out of any surplus income from the joint family nucleus, but out of the sale consideration of the joint family property.

26. As rightly held by the Courts below, this fact has not been proved and therefore, the Courts below were right in holding that the suit property is only a self-acquired property of the second respondent and therefore, the decree in O.S.No.68 of 2003 is executable.

27. Now turning to the decree passed in O.S.No.905 of 2002, the learned counsel for the appellants would submit that though it is an ex-parte decree, it cannot be stated to be null and void. It has got all legal force.

28. Regarding this proposition, I may not have any doubt. But at the same time, there can be no difficulty in holding that the said suit is a collusive suit filed by the appellants in collusion with the second respondent only to deprive the first respondent to get the sale completed in his favour. Admittedly the sale agreement is dated 21.6.2002, whereas, the partition suit was filed on 17.12.2002. The second respondent remained ex-parte throughout in the partition suit at all stages. Therefore, in my considered opinion, the Courts below were right in holding that the said decree is a collusive decree and since the first respondent is not a party to the said suit, the said decree will not bind him. Therefore, there is no legal impediment for the first respondent to execute the decree in O.S.No.68 of 2003.

29. In view of all these observations, I answer all the Substantial Questions of Law in favour of the first respondent.

30. In the result, the second appeal fails and the same is accordingly dismissed. No costs. Connected miscellaneous petition is dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

msk

To

1.The Principal District and Sessions Court, Erode

2. The Second Additional Subordinate Judge, Erode.

1 cc to M/s.Sarvabhauman Associates,Advocate, SR.No.15881

1 cc to Mr. N.Manokaran,Advocate, SR.No.15810

S.A.No.781 of 2013

vd(co)

pmk.22.5.2015